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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Ford Motor Company and
Robert H. Irwin Motors, Inc.,

Petitioners,

v.

Jo-Ann Tebbetts, Administratrix of the Estate of
Rebecca Anne Tebbetts,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of New Hampshire

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Supreme Court of New Hampshire's unanimous ruling that the Ford Motor Company's compliance with a Federal motor vehicle safety standard issued pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 ("the Safety Act") does not exempt Ford from liability under state common law when: (1) the ruling is the first issued by a state court of last resort or a U.S. court of appeals on the preemptive effect of the Safety Act since this court decided *Cipollone v. Liggett Group, Inc.*, and *Freightliner Corp. v. Myrick*, and (2) the Safety Act explicitly says "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

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STATEMENT OF THE CASE

On May 15, 1991, the 1988 Ford Escort that Rebecca Anne Tebbetts was driving hit a rock, swerved off the road, and ran into a tree. The car was equipped with a manual lap belt, which Rebecca had connected, and a motorized shoulder harness, but it was not equipped with a driver's-side air bag. The lap belt and shoulder harness restrained Rebecca to some extent, but she still hit the steering wheel with such force that she died.

On January 29, 1993, Rebecca's mother, serving as the administratrix of her estate, filed this suit under New Hampshire common law against the Ford Motor Company and Robert H. Irwin Motors, Inc. (collectively "Ford"), alleging that the 1988 Ford Escort driven by Rebecca was negligently designed because it lacked a driver's-side airbag. The suit further alleges that, if the car had contained a driver's-side airbag, Rebecca would have survived the crash.

When the 1988 Ford Escort driven by Rebecca Tebbetts was manufactured, federal regulations promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 ("the Safety Act") -- specifically, Federal motor vehicle safety standard 208 -- did not prohibit Ford from installing airbags in the Ford Escort or any other car. Standard 208 did, however, require Ford to install some form of passive restraint in at least 25 percent of its 1988 model-year cars. 49 C.F.R. § 571.208. It also required all cars to have, at a minimum, either a manual lap belt and shoulder harness, a manual lap belt and motorized shoulder harness, or an airbag or other device that provided automatic protection to vehicle occupants. *Id.* In this case, the complaint alleges that Ford acted negligently by failing to do more than the minimum that Standard 208 required.

On August 11, 1993, Ford moved for summary judgment asserting that, even if all of the allegations in this case are true, Ford's compliance with Standard 208 exempts it from liability under New Hampshire common law. Two months later, the trial court granted Ford's motion. Relying heavily on four federal

appeals court rulings issued before this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) ("*Cipollone*"), the trial court held that plaintiff's claims are impliedly preempted. Petitioners' Appendix ("Pet. App.") at 10a.

On appeal, the Supreme Court of New Hampshire unanimously reversed. In a decision issued on September 19, 1995, it briefly reviewed the facts and the applicable law, taking special note of this Court's recent decisions clarifying preemption analysis in *Cipollone* and *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) ("*Myrick*"). In accordance with those decisions, the Supreme Court of New Hampshire then addressed the issues of express and implied preemption.

On the issue of express preemption, the Court held that Congress had made its intent clear by enacting the Safety Act's saving clause, 15 U.S.C. § 1397(k).[1] That section provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* The Court acknowledged that the Safety Act also contains an express preemption clause which prohibits a State from establishing a safety standard "which is not identical to the Federal standard," Pet. App. at 4a (quoting 15 U.S.C. § 1392(d)), and that "[a] rule of the common law which permits the recovery of monetary damages for its breach self-evidently sets a standard. . ." Pet. App. at 4a. It said, however, that the preemption clause could not be "read in isolation" and had to be interpreted "in tandem with the saving clause." *Id.* at 4a-5a. Emphasizing the unequivocal wording of the saving clause, the

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[1]The Safety Act, 15 U.S.C. §§ 1381 *et seq.*, and other statutes governing transportation were recently recodified "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). As a result, what was 15 U.S.C. § 1397(k) is now 49 U.S.C. § 30103(e). All of the applicable preemption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. For convenience, this brief uses the citations employed in those decisions.

Court said, "It is difficult to imagine broader language." Pet. App. at 5a (quoting *United States v. James*, 478 U.S. 597, 604 (1986)). It, therefore, held that "state common law is not explicitly preempted." Pet. App. at 5a.

On the issue of implied preemption, the New Hampshire Supreme Court recognized that this Court's decision in *Cipollone* "clarified preemption analysis" by stating as follows:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

Pet. App. at 4a (quoting *Cipollone*, 112 S. Ct. at 2618). The New Hampshire Supreme Court also recognized the teaching of this Court's then five-month-old decision in *Myrick* that "*Cipollone* supports an inference that an express preemption clause forecloses implied pre-emption[,] it does not establish a rule." Pet. App. at 4a (quoting *Myrick*, 115 S. Ct. at 1488).

Based on the foregoing, the Court stated that its first task with respect to implied preemption was to determine whether the Safety Act or its legislative history "provides a reliable indicium of congressional intent with respect to state authority." Pet. App. at 5a (quoting *Cipollone*, 112 S. Ct. at 2618). After reviewing the legislative history, it determined that, by inserting the saving clause, Congress intended, in the words of the House committee report, "that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." Pet. App. at 6 (quoting H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966)).

Given the clarity of the Safety Act's language and legislative history, the New Hampshire Supreme Court concluded that, under *Cipollone*, there was no reason to consider the issue of implied preemption further. It said:

> Having determined that the preemption clause when read in tandem with the saving clause "provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Cipollone,* 112 S. Ct. at 2618 (citation and quotation omitted).

Pet. App. at 6a. The Court acknowledged Ford's argument "that the majority of courts faced with a similar preemption inquiry have held common law actions preempted," citing *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) (finding no express preemption, but implied preemption, of common law claims). Pet. App. at 6a. But it found those implied preemption decisions unconvincing because of this Court's intervening decision in *Cipollone*. "Had the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood,*" the Court said, "Ford's argument would be more persuasive." Pet. App. at 6a.

"[W]hile it remains to be seen whether a jury in this case will find that Ford acted unreasonably, notwithstanding its alleged compliance with Standard 208," the Court concluded, "the issue before this court at this time is whether the plaintiff has a right to ask the jury to decide. We hold that on these issues she does." *Id.* (quotation marks and brackets omitted). Ford now seeks review by this Court to prevent any trial from taking place.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW CREATES NO CONFLICT BECAUSE IT IS THE FIRST RULING ISSUED BY A STATE COURT OF LAST RESORT OR A U.S. COURT OF APPEALS ON THE PREEMPTIVE EFFECT OF THE SAFETY ACT SINCE THIS COURT CLARIFIED THE LIMITS ON IMPLIED PREEMPTION ANALYSIS IN *CIPOLLONE* AND *MYRICK*.

Ford's primary argument is that review is necessary because the decision below directly conflicts with *Wood*, 865 F.2d 395, and three other federal appeals court decisions finding common law claims involving passive restraints impliedly, but not expressly, preempted -- *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.* 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp*, 875 F.2d 878 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). As the Supreme Court of New Hampshire found, if this Court had not "clarified preemption analysis in *Cipollone* subsequent to *Wood* [and the other decisions], Ford's argument would be more persuasive." Pet. App. at 6a.

The Supreme Court of New Hampshire's decision creates no conflict because it is the first ruling issued by a state court of the last resort or a federal appeals court on the Safety Act's preemptive effect since this Court clarified the limits on implied preemption analysis in *Cipollone* and *Myrick*. There is no good reason to review this decision at this time. The Supreme Court of New Hampshire's ruling is wholly consistent with the unanimous appellate rulings issued during the Safety Act's first twenty years, before the Third Circuit improperly expanded implied preemption in *Cipollone*. The four federal appeals court implied preemption decisions (and others) relied upon by Ford are of no moment. They were issued before this Court rejected the Third Circuit's

approach in *Cipollone* and do not establish an existing conflict. To the contrary, as the history of *Myrick* reflects, they will inevitably be reconsidered (and should properly be rejected) in light of this Court's recent rulings. To demonstrate these points, a brief review of the cases interpreting the Safety Act's preemptive effect is in order.

The Safety Act was enacted in 1966. Over the next twenty years, eight federal appeals courts and five state courts of last resort addressed the issue of whether compliance with Federal motor vehicle safety standards exempts auto manufacturers from liability in design defect cases. Each reached the same conclusion: Congress's words mean what they say -- "Compliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).[2]

In 1986, however, the U.S. Court of Appeals for the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d. Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992), expanding the implied preemption doctrine to find certain common law claims involving cigarettes preempted despite Congress's intent to the contrary. Within a

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[2]*See Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1198 (Ala. 1985); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (1976); *Arbet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 438 (1976).

year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

Before this Court had an opportunity to overturn these decisions, the defective strain of implied preemption analysis adopted in the cigarette cases infected the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood,* 865 F.2d 395, in which General Motors was, once again, arguing that it was exempt from common law liability because it had complied with a Federal motor vehicle safety standard -- specifically, Standard 208 governing occupant restraints. In a two-to-one decision, with Judge Selya dissenting, the First Circuit explicitly adopted the rationale of *Palmer,* its recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim impliedly preempted by the Safety Act, despite Congress's clear statement of anti-preemptive intent. *Wood,* 865 F.2d at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, issuing the other implied preemption decisions relied on by Ford. *See supra* at 5.

In 1992, however, this Court issued its decision in *Cipollone*, explicitly rejecting the Third Circuit's (and its sister courts') expansion of the implied preemption doctrine. In a portion of the opinion joined by seven members of this Court, it said:

> In our opinion, the pre-emptive scope of the [two statutes at issue] is governed entirely by the express language in . . . each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions

> of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

112 S. Ct. at 2618.[3]

Cipollone's clarification of the limits of implied preemption analysis effectively invalidated the decisions finding implied preemption under the Safety Act. Since *Cipollone*, one federal court of appeals and two state courts of last resort have considered the Safety Act's preemptive effect on common law claims. All three have found no preemption.

In the first such case, *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub. nom on other grounds Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), the Eleventh Circuit held that *Cipollone* negated its prior implied preemption decision in *Taylor* and that the Safety Act expressly preserved the common law claims at issue. Upon review, this Court said that the Eleventh Circuit had misread *Cipollone* to hold that implied preemption is barred whenever Congress includes an express preemption clause in a statute. *Myrick*, 115 S. Ct. at 1487. The Court clarified the proper approach to preemption analysis, saying:

> The fact that an express definition of the pre-

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[3]In language particularly relevant to preemption analysis under the Safety Act, this Court added: "[T]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1985, Congress expressly pre-empted State or local imposition of a 'statement relating to the use of smokeless tobacco products and health' but, at the same time, preserved state law damages actions based on those products." *Id.* (footnote omitted).

> emptive reach of a statute "implies" -- i.e., supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption . . . At best, *Cipollone* supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.

Myrick, 115 S. Ct. at 1488. This Court did not address the Eleventh Circuit's holding that, under *Cipollone*, section 1397(k) constitutes such a "reliable indicium of congressional intent" that it precludes a finding of implied preemption under the Safety Act. *See Myrick*, 13 F.3d at 1525-27, 115 S. Ct. at 1487 n.3. Instead, this Court unanimously affirmed the Eleventh Circuit's finding of no preemption on the ground that there was no relevant Federal motor vehicle safety standard in effect. *Id.* at 1485-88.[4]

The Supreme Court of Arizona also considered the Safety Act's preemptive effect after this Court decided *Cipollone*, but before this Court decided *Myrick*. Relying in part on the Eleventh Circuit's decision in *Myrick*, the Supreme Court of Arizona unanimously held in *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Az. 1994), *vacated and remanded*, 115 S. Ct. 1819 (1995), that the Safety Act does not preempt a state common law claim against a car manufacturer for failing to incorporate a

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[4]Ford's assertion that this Court's clarification of preemption analysis in *Myrick* somehow reinstated *Taylor* as the law of the Eleventh Circuit is meritless. This Court made clear in *Myrick* that implied preemption analysis is not necessarily foreclosed when Congress has enacted an express preemption clause that "implies", but leaves open the question of whether, "other matters" are preempted. 115 S. Ct. at 1488. In the Safety Act, however, Congress enacted an express *anti-preemption* clause that explicitly preserves common law claims. *Cipollone* and *Myrick* both demonstrate that, when such a "reliable indicium of congressional intent" exists, the courts cannot contravene Congress's statement through use of the implied preemption doctrine. That is exactly what *Taylor* did; it is no longer good law.

lap belt into its passive restraint system. After this Court issued its decision in *Myrick*, it vacated the Arizona Supreme Court's decision in *Hernandez-Gomez* and remanded that case for reconsideration in light of its ruling.

The decision by the Supreme Court of New Hampshire in this case is, therefore, the first ruling by a state court of last resort or a federal appeals court on the Safety Act's preemptive effect since this Court issued both *Cipollone* and *Myrick*. It should not be reviewed at this time because no true conflict exists. Indeed, there has not been sufficient time since *Cipollone* and *Myrick* to see if such a conflict will develop. This Court has repeatedly declined to review federal appeals court decisions interpreting the preemptive effect of other federal statutes on common law claims, even when clear pre-and/or-post-*Cipollone* conflicts exist, allowing the federal circuits and the state courts of last resort to explore and debate the significance of *Cipollone* and *Myrick* statute-by-statute, without early intervention by this Court. *Compare, e.g., Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.) (federal pesticide legislature expressly preempts common law claims), *cert. denied,* 114 S. Ct. 300 (1993), *with Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.) (federal pesticide legislation neither expressly nor impliedly preempts common law claims), *cert. denied*, 469 U.S. 1062 (1984); *compare King v. Collagen Corp.*, 983 F.2d 1130 (1st Cir.) (federal medical device legislation expressly preempts common law misrepresentation and failure to warn claims), *cert. denied,* 114 S. Ct. 84 (1993), *with Michael v. Shiley, Inc.*, 46 F.3d 1316 (3d Cir.) (federal medical device legislation does not preempt common law misrepresentation and failure to warn claims), *cert. denied*, 63 U.S.L.W. 3874 (Oct. 2, 1995). It should follow no different course here.

Ford contends that review is necessary despite the recent vintage of *Cipollone* and *Myrick* because some intermediate state appeals courts and federal district courts have found implied preemption under the Safety Act since this Court decided *Cipollone*. *See* Pet. at 10-11. Disagreements at the intermediate

state appeals court and federal district court levels, however, are hardly sufficient to warrant this Court's review. Ford, therefore, maintains that the lower court decisions are not simply yielding different results, but are "eroding the very core of the federal safety policy" by discouraging "diversity in passive restraint systems." *Id.* at 12. This argument makes no sense. First, if it was current federal policy to encourage diversity in passive restraint systems, then disagreements among the lower courts would presumably reinforce that policy, not erode it. The manufacturers could hardly be prompted to take uniform actions by varying court decisions. Second, whether or not it was federal policy at some time in the past to encourage diversity in passive restraint systems, it is plainly federal policy today to encourage all auto manufacturers to install airbags in their cars. *See* 49 U.S.C. § 30127(b) (requiring airbags for front seat drivers and passengers in at least 95 percent of new cars after August 31, 1996, and 100 percent of new cars after August 31, 1997).

Ford's real reason for seeking review now is that, if the lower courts have a chance to consider the implications of *Cipollone* and *Myrick*, they are likely to agree with the Supreme Court of New Hampshire and reject the pre-*Cipollone* implied preemption federal appeals court decisions relied upon by Ford. Ford virtually concedes as much, saying, "Unless this Court resolves the conflict and confirms that the federal courts of appeals are correct and the Supreme Court of New Hampshire incorrect, more and more plaintiffs are likely to bring 'no-airbag' claims, trying to persuade still more courts to align themselves with the minority, errant no-preemption view." Pet. at 13. The likelihood that the lower courts will increasingly reject the petitioner's position is hardly a reason for granting review.[5]

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[5]Ford also argues that review is needed because, in *Myrick*, this Court mentioned but did not resolve two statutory interpretation issues raised by this case: whether section 1392(d) preempts common law claims and whether section 1397(k) preserves them. *See* Pet. at 13. That fact, however, does not support review. There is no need for this Court to resolve those issues now because there

II. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS GOVERNING PREEMPTION ANALYSIS.

Ford's secondary argument is framed as one of broad application. Review is necessary, Ford insists, because "the Supreme Court of New Hampshire misconstrued and misapplied this Court's decisions that establish the manner in which preemption analysis is required to be conducted." Pet. at 14. Upon analysis, however, Ford's argument boils down to the contention that the Supreme Court of New Hampshire should have ruled in Ford's favor. Even if Ford is right, review would not be warranted on this basis. Moreover, Ford is wrong.

To begin with, Ford maintains that the Supreme Court of New Hampshire erred in rejecting Ford's argument that the Safety Act expressly preempts common law claims. Ford contends that the lower court "ignore[d] the express preemption provision" of the Safety Act and "focus[ed] solely on section 1397(k)" which, Ford says, "is not a saving clause" at all. Pet. at 15-16. In Ford's view, section 1397(k) does not address the issue of federal preemption; it simply addresses the extent to which compliance with federal regulations is an affirmative defense as a matter of state law. *Id.* at 18-20. Ford says that, in *Honda Motor Co. v. Kimbrel*, 376 S.E.2d 379, 383 (Ga. Ct. App. 1988), the court determined that compliance with federal Standard 208 was a complete defense under Georgia law to a claim that a car was defective because it lacked an airbag. *Id.* at 19. "Section 1397(k)," Ford asserts, "*permits* a state court to reach that conclusion, but it expresses Congress' intent not to *mandate* that result." Pet. at 19 (emphasis in original).

This is an astonishing argument. The Supreme Court of

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is no serious conflict about them among the state courts of last resort and the federal circuits. If and when such a conflict develops, this Court can and should act to resolve it.

New Hampshire did not ignore the Safety Act's express preemption provision. It considered the provision, as it should have, "in tandem with the saving clause." Pet. App. at 5a. When it did so, the Court correctly held, as has every state court of last resort and every federal appeals court to consider the question -- including the four federal circuits relied upon by Ford -- that section 1397(k) precludes a finding that the Safety Act expressly preempts common law claims. *See, e.g., Pokorny*, 902 F.2d at 1120-21; *Taylor*, 875 F.2d at 823-25; *Kitts*, 875 F.2d at 789; *Wood*, 865 F.2d at 401-02.

Ford's contention that section 1397(k) addresses the extent to which compliance with federal regulations is a defense as a matter of state law makes little sense. Congress was enacting a federal law, not a state law. It was concerned with the substantive content of the federal law it was enacting, not the substantive content of state laws. Furthermore, at the time Congress enacted the Safety Act (and still today), it was already the law in every state that compliance with a federal regulation is not an absolute defense in an action for negligent failure to do more. *See Restatement (Second) of Torts* 288C (1964).[6]

Under Ford's interpretation of the Safety Act, moreover, section 1397(k) would be meaningless if it only negated the state law defense of compliance with an applicable federal regulation. According to Ford, common law claims against a manufacturer for failing to do more than an applicable federal safety standard requires are preempted by the Safety Act's express preemption

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[6]*See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175 (1989) ("[f]or a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with government statutes and regulations is admissible only as evidence of the defendant's exercise of due care. Therefore, such compliance generally 'does not prevent a finding of negligence where a reasonable man would take additional precautions.'") (citing *Restatement*) (footnotes omitted).

provision. If that is so, then those common law claims simply cannot be pursued. The manufacturer would not need any defense under state law, so there would be no reason for section 1397(k) to address it. If section 1397(k) did address the content of state law, however, it would have precisely the opposite effect that Ford claims: it would not permit state courts to conclude, as Ford says Georgia's did in *Honda Motor Co. v. Kimbrel*, 376 S.E.2d at 379, that compliance with a Federal standard establishes an absolute defense against common law liability. Section 1397(k) says compliance with a Federal standard "*does not* exempt any person from any liability under common law." *Id.* (emphasis added).

Ultimately, Ford's express preemption argument fails for the same reason its implied preemption arguments fail: the plain and unequivocal words of section 1397(k) accurately reflect Congress's intent to preserve all common law claims. The Safety Act's legislative history makes this clear. As the Supreme Court of New Hampshire recognized, the original Senate version of the Safety Act contained no saving clause, but both the Senate committee report and Senator Warren Magnuson, the bill's sponsor, said that compliance with Federal standards "would not necessarily shield any person from . . . liability at common law." Pet. App. at 5a (quoting S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966) and 112 Cong. Rec. 14230 (1966)). Senator Magnuson added, "The common law on product liability still remains as it was." *Id.*

This language was not good enough for the House of Representatives, so it added section 1397(k) -- explicitly preserving all common law claims. If the plain words of that section leave any doubts as to Congress's intent, they are surely resolved by the House committee report. As the Supreme Court of New Hampshire noted, the report says:

> *It is intended*, and this subsection specifically establishes, *that compliance with safety standards is not to be a defense or otherwise to affect the*

> *rights of parties under common law* particularly those relating to *warranty*, contract, *and tort liability*.

Pet. App. at 5a-6a; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

What prompted the House of Representatives to insert section 1397(k) and make Congress's intent undeniably clear was the following Congressional testimony of Tom Triplett of Chester, South Carolina:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulations but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded.

Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, 89th Cong., 2d Sess. Part 2, 1249 (1966). Ironically, Mr. Triplett's testimony was a prescient summary of the actions of the auto manufacturers would later take in regard to airbags. *See, e.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile*

Insurance Co., 463 U.S. 29, 50 (1980) ("the automobile industry waged the regulatory equivalent of war against the airbag"). Congress responded to that testimony by expressly preserving all common law claims.

Despite all of the foregoing, Ford contends that, even if section 1397(k) does preclude a finding of express preemption, the Supreme Court of New Hampshire erred in failing to find plaintiff's common law claims impliedly preempted. Ford advances four arguments why this is so, each of which can be dismissed in short order.

First, Ford says that the Supreme Court of New Hampshire "failed to recognize the doctrine of implied conflict preemption." Pet. at 20. This is an odd assertion, since the decision below explicitly says that, in the absence of express instruction from Congress, "state law is pre-empted to the extent that it actually conflicts with federal law." Pet. App. at 4a. The fact that the decision below did not list all of the ways that state law can be found to "actually conflict" with federal law is hardly significant. The various types of "actual conflict" were fully briefed by the parties, the pre-*Cipollone* decisions finding implied preemption on "actual conflict" grounds were considered and rejected, and the Supreme Court of New Hampshire ultimately concluded that, given the clarity of Congress's words, it could not properly find plaintiff's common law claims impliedly preempted on "actual conflict" or any other grounds. *See* Pet. App. at 6a.

Second, Ford says that the Supreme Court of New Hampshire failed to recognize that *Myrick* "rejected the notion that *Cipollone* had effectively prohibited implied preemption analysis whenever an express preemption provision exists." Pet. at 22. In fact, however, the New Hampshire Supreme Court applied *Myrick* properly. The Court acknowledged that the Safety Act contains an express preemption provision, but noted that, under *Myrick*, that fact only "supports an inference" that implied preemption is foreclosed and "does not establish a rule." Pet. App. at 4a. The

Court, therefore, reviewed both the language and the legislative history of the Safety Act to determine whether, in *Cipollone*'s words, they provided "a reliable indicium of congressional intent with respect to state authority." Pet. App. at 5a. Once it concluded that they did, the Court followed *Cipollone*'s instruction that "there is no need to infer congressional intent to pre-empt." *Id.* at 6a. Ford's true position, in contrast, is that a court may consider implied preemption even where, as here, Congress's express words *do* provide a reliable indicium of congressional intent with respect to preemption. That is not what *Myrick* says. Indeed, this Court has repeatedly reaffirmed that, in determining whether state law is preempted, its "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1987) ("*California Federal*"). If Congress's plainly expressed intent is to *preserve*, rather than preempt, common law claims, then a court lacks authority to second-guess that determination. Ford's contrary analysis turns preemption on its head, by claiming that a court can find implied preemption even when Congress has unequivocally directed "no." *Myrick* did not -- and could not -- so hold.

Third, Ford says that the Supreme Court of New Hampshire erred because it failed to recognize "that federal regulations can themselves effect implied conflict preemption." Pet. at 25. This assertion is both legally and factually misguided. As a legal matter, federal regulations *cannot* themselves effect implied conflict preemption if Congress has said they cannot. It is Congress's intent -- not the agency's or the court's -- that is the "ultimate touchstone of preemption analysis." *Cipollone*, 112 S. Ct. at 2617. In the Safety Act, Congress explicitly said that the agency's regulations do not exempt any person from liability under common law; neither the agency nor the courts are free to ignore that legal instruction. As a factual matter, even when an agency has the power to issue regulations that effect implied conflict preemption, its regulations do not preempt state laws if there is no conflict. That is the situation in this case. The version of Standard 208 in effect when Ford manufactured the 1988 Ford

Escort driven by Rebecca Anne Tebbetts did not prohibit Ford from manufacturing the car (or, for that matter, all of its cars) with a manual lap belt, a motorized shoulder harness, *and* a driver's-side airbag. It simply said that, at a minimum, Ford had to equip at least 25 percent of its 1988 model-year cars with some form of passive restraint. Even if a Federal motor vehicle safety standard could impliedly preempt a state common law claim that actually conflicts with it, Standard 208 would not impliedly preempt the common law claim in this case.[7]

Fourth, having previously insisted that section 1397(k) is not a saving clause, *see* Pet. at 16, Ford asserts that the Supreme Court of New Hampshire erred because it failed to recognize the rule that "saving clauses do not preclude implied conflict preemption" and "preclude only implied field preemption." Pet. at 25-26. To be blunt, there is no such rule, nor should there be. If Ford's rule was the law, this Court would not have repeatedly said that, in determining whether state law is preempted by federal law, the courts' "sole task is to ascertain the intent of Congress." *California Federal*, 479 U.S. at 280. Courts would be free to ignore Congress's intent, finding state law preempted whenever, in the court's view, it somehow "conflicted" with any aspect of federal law. Even if Congress had explicitly said that state law

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[7]Ford spends several pages quoting from the Secretary of Transportation's 1984 explanation as to why she was promulgating a version of Standard 208 that did not immediately require only airbags in all cars. *See* Pet. at 4-6. The Secretary's lengthy explanation was not surprising -- four years earlier, in *Motor Vehicle Manufacturers Association*, 463 U.S. at 46-48, this Court held that the agency's decision to issue Standard 208 without discussing the "airbags-only option" was "arbitrary and capricious." The explanation is, however, irrelevant to the issues in this case. Congress did not purport to give the Secretary of Transportation the power to preempt common law claims by issuing Federal safety standards, the Secretary did not purport to preempt common law claims in issuing Standard 208, and respondent does not challenge Standard 208 or the Secretary's decision to forego an "airbags-only" requirement. Respondent does not even contend that the 1988 Ford Escort driven by Rebecca Anne Tebbetts should have had an airbag only; she contends that the car should have had an airbag in addition to its lap belt and shoulder harness.

was preserved, its intent would not matter; the courts and federal agencies could displace state law on a free-roaming basis, untethered by Congress's words.

Such an outcome is, of course, the result Ford seeks in this case because, here, Congress unequivocally preserved plaintiff's common law claims. This Court has never, however, adopted Ford's unconstrained approach to implied conflict preemption. It should not review this case in order to do so now.[8]

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[8]Ford's final assertion is that the decision below is the type of "no-airbag" ruling that the United States has suggested should be reviewed by this Court. *See* Pet. at 27. That assertion is incorrect. The Brief of the United States as *Amicus Curiae* filed with this Court in *Wood* says, at 19, "[A]djudication of this case could require the Court to pass on difficult issues that have not been considered by the lower courts. One is . . . how vehicles should be treated if they were manufactured during the three year phase-in period (1987-89) when manufacturers had to install passive protection systems in only a percentage of their new cars. To our knowledge, no federal or state appellate court has considered any of these questions, and we believe it preferable that this Court not be the first to do so." As Ford accurately notes, Pet. at 27, the government then concluded, "[W]e believe that the Court should stay its hand and see whether a conflict on the preemption question hereafter develops among the federal courts of appeal or the state courts of last resort." Respondent shares that belief today.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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